

**COURT OF CHANCERY
OF THE
STATE OF DELAWARE**

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

August 16, 2011

Brian M. Rostocki, Esq.
Reed Smith LLP
1201 North Market Street, Suite 1500
Wilmington, DE 19801-1163

David L. Finger, Esq.
Finger & Slanina, LLC
One Commerce Center
1201 North Orange Street, 7th Floor
Wilmington, DE 19801-1186

Re: *Jagodzinski v. Silicon Valley Innovation Co., LLC*
Civil Action No. 6203-VCP

Dear Counsel:

This action is presently before this Court on Defendant's motion for a stay pending appeal. For the reasons stated in this Letter Opinion, I deny that motion, but modify my Order of August 9, 2011 directing production of certain documents pursuant to 6 *Del. C.* § 18-305, to extend the deadline for such production until and including August 30, 2011. This short extension should enable Defendant to pursue its motion for a stay pending appeal in the Supreme Court in an orderly fashion.

I. BACKGROUND

A. Parties

Plaintiff, Christian Jagodzinski, is a member of Silicon Valley Innovation Co., LLC ("Defendant" or "SVIC"). SVIC is a Delaware LLC that operates as an investment fund and maintains offices in California and Florida.

B. Facts¹

In 2000, Jagodzinski invested \$1,000,000 in Silicon Valley Internet Capital, Inc. Soon after, in or around 2001, Silicon Valley Internet Capital, Inc. merged to form SVIC.

On September 16, 2010, Jagodzinski served a written demand upon SVIC's registered agent (the "First Demand") for the purpose of inspecting and making copies and extracts of certain books and records of SVIC. In response, SVIC provided some information, including tax returns and documents related to transactions identified by Jagodzinski. After December 8, 2010, however, SVIC became unresponsive and refused to respond to any communications from Plaintiff's counsel despite prior assurances of cooperation. On January 25, 2011, Jagodzinski served another demand upon SVIC (the "Second Demand"), but SVIC did not respond to this demand.

Plaintiff claims to seek the requested records to "value his interest in SVIC, to determine the status of his investment and how the investment was utilized, to prepare and/or amend his tax returns, if necessary, and to investigate possible mismanagement and wrongdoing of SVIC and/or its managers."² Jagodzinski also professes concern that SVIC "entered into certain interested party transactions" that may or may not be

¹ Unless otherwise noted, the facts recited in this Letter Opinion are drawn from Plaintiff's Complaint and are assumed to be true for the purposes of the pending motion.

² Compl. ¶ 13.

“consistent with the disclosure and authorization requirements reflected in the [LLC] Agreement and/or Delaware Law.”³

C. Procedural History

Jagodzinski filed his Complaint on February 18, 2011, seeking an order compelling SVIC to produce copies of the documents requested in the First and Second Demands. On February 23, SVIC was served with a summons ordering it to respond to the Complaint. On April 1, after SVIC failed to comply with the summons, Jagodzinski filed a motion for a rule to show cause why a default judgment should not be entered against SVIC. Defendant failed to appear at the May 2 hearing on that motion. Therefore, I entered a Default Judgment on May 4, ordering SVIC to grant Plaintiff access to the requested books and records by May 20.

On the May 20 deadline, SVIC moved to vacate the default judgment and dismiss this action for failure to state a claim. The parties briefed that motion and, on August 3, SVIC appeared before the Court to argue its motion. Ultimately, I denied SVIC’s motion, as well as Plaintiff’s cross-motion for attorneys’ fees.⁴

³ *Id.*

⁴ I modified the scope of the Default Judgment, however, such that SVIC was only required to provide those minutes of annual or special meetings held by the Board, any committee of the Board, and any membership meetings discussing or voting on or relating to a few specifically identified transactions.

SVIC now moves for a stay pending appeal of the Court's August 9, 2011 order granting Jagodzinski's request for inspection of SVIC's books and records. SVIC asserts that this Court improperly denied its motion to vacate and dismiss. Further, it claims that absent a stay, it will lose the right it seeks to protect and its appeal effectively will be rendered moot. Conversely, Jagodzinski argues that SVIC merely has repeated the same arguments that I rejected in the August 3 hearing and has not shown good cause for a stay.

For the reasons discussed below, I deny SVIC's motion.

II. Analysis

A motion for a stay pending appeal is addressed to the discretion of the trial court.⁵ In exercising its discretion, the Court considers whether: (1) the appeal is likely to succeed on the merits; (2) the movant will suffer irreparable harm absent a stay; (3) any other interested party will suffer substantial harm if the court grants the stay; and (4) the grant of the stay will harm the public interest.⁶ No one factor is dispositive; rather, the Court will carefully weigh all relevant considerations.⁷

⁵ Sup. Ct. R. 32(a); Donald J. Wolfe, Jr. & Michael A. Pittenger, *CORPORATE & COMMERCIAL PRACTICE IN THE DELAWARE COURT OF CHANCERY* § 14-9 at 14-17 (2005).

⁶ *Wynnefield P'rs Small Cap Value L.P. v. Niagara Corp.*, 2006 WL 2521434, at *1 (Del. Ch. Aug. 9, 2006) (citing *Tafeen v. Homestore, Inc.*, 2005 WL 1314782, at *1 (Del. Ch. May 26, 2005)).

⁷ *Id.* (citing Wolfe & Pittenger § 14-9 at 14-18 (citing cases)).

A. Likelihood of Success on the Merits

In evaluating the appeal's likelihood of success on the merits, this Court "is called upon not to second guess its decision, but to assess, as objectively as possible, whether the case presents a fair ground for litigation and more deliberative investigation."⁸ Moreover, "[s]imply stating an intention to appeal is insufficient . . . to demonstrate a likelihood of success on the merits."⁹

SVIC asserts that its appeal is likely to succeed because the Court's ruling on its procedural demand defense conflicts with several principles of statutory construction.¹⁰ Moreover, it argues that this Court's interpretation of 6 *Del C.* § 18-305(b) raises practical concerns regarding LLC member demands that necessitate a contrary finding. Jagodzinski responds that SVIC's appeal merely rehashes previously unsuccessful argument and, therefore, is unlikely to succeed. He also contends that SVIC's proposed interpretation conflicts with the legislative intent of the drafters and would be impracticable for certain other types of LLC members (*e.g.*, partnerships, corporations, and government entities).

⁸ *Id.*

⁹ *Id.* (quoting *Tafeen*, 2005 WL 1314782, at *1).

¹⁰ Specifically, SVIC reiterates its argument that this Court lacks jurisdiction because of Plaintiff's failure to abide by the statutory requirement that demand be made by an LLC member, as opposed to an agent of the member.

I agree that SVIC, for the most part, restates the same arguments I already rejected during the August 3 argument.¹¹ I also am not persuaded that SVIC's contention that an attorney for a member of an LLC cannot make a demand for the member under § 18-305(b) presents either a serious legal question or raises a fair ground for litigation. The "new" practical concerns that SVIC raises in support of its motion to stay are unlikely to arise in the case of attorneys holding themselves out as representing an LLC member. For one thing, the Lawyers' Rules of Professional Conduct provide at least some protection in that regard. In addition, as Jagodzinski noted, 6 *Del C.* § 18-305(f) authorizes a member demanding access to books and records to file suit, if necessary. Although that section only explicitly mentions a member, it would be absurd to suggest that the member's attorney, therefore, could not also file a suit for books and records. Hence, I continue to view SVIC's contrary argument as to § 18-305 to be hypertechnical and inconsistent with the Legislature's intent. Thus, the merits factor weighs in favor of denying Defendant's motion.

B. Irreparable Harm

Appellants generally have a "fundamental interest . . . in having effective appellate review."¹² Because the inspection of books and records cannot be undone, this Court has granted stays pending appeal in these types of actions.¹³

¹¹ Argument Tr. ("Tr.") 34-37.

¹² *State Dep't of Ins. v. Remco Ins. Co.*, 12 Del. J. Corp. L. 230, 234 (Del. Ch. 1986).

Defendant argues that a denial of its motion will result in irreparable harm to it, because it would lose the right it seeks to protect, as well as the entire basis for its appeal. As stated in *Bond Purchase, L.L.C. v. Patriot Tax Credit Properties, L.P.*, however, “a movant pursuant to Rule 62(c) must point to some injury other than compliance with this Court’s Order and mootness of its appeal in order for this factor to weigh in the movant’s favor.”¹⁴

Here, denial of the motion to stay may result in some harm to SVIC, as it would undermine its opportunity for Supreme Court review of the judgment. Yet, I do not accord this factor much weight in the circumstances of this case. The objection to the form of the demand that SVIC raises for the first time after this Court had entered a default judgment against it was never mentioned before the judgment was entered. SVIC had counsel when it responded to Plaintiff’s First Demand, but it did not raise this defense at that time. Had it done so, Jagodzinski easily could have mooted the issue by submitting a demand in his own name to save time and money, even if he disagreed with SVIC’s position. In these circumstances, SVIC’s cries of irreparable harm tend to ring hollow.

¹³ See *Wynnefield*, 2006 WL 2521434, at *2 (citing *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499 (Del. 2005)).

¹⁴ 1999 WL 669358, at *8 (Del. Ch. Aug. 16, 1999).

C. Substantial Harm to any other Interested Party

The parties also dispute whether a stay would result in harm to any interested party. SVIC claims that Jagodzinski would not be harmed by a stay, because there is no imminent transaction such that disclosure is necessary to allow him to protect his rights. Jagodzinski counters that he would suffer substantial harm if this supposedly summary books and records action, which already has taken far more than the usual time, is continued even longer without granting him relief.

While neither side presents a particularly compelling argument for a finding of substantial harm, I find that the balance of harms weighs in favor of denying a stay. Nearly seven months already have passed since Jagodzinski made his second demand for inspection of SVIC's books and records,¹⁵ and if this action is stayed pending appeal, he may be forced to wait a number of months more before finally obtaining the information he seeks. Because SVIC has been uncooperative and nonresponsive throughout most of this litigation, the Court is reluctant to cause Jagodzinski a further delay.

D. Public Interest

Both SVIC and Jagodzinski have failed to present any persuasive argument that leads me to believe that the public interest is at stake here. Therefore, I find that this factor is neutral.

¹⁵ Compl. ¶ 10.

E. Attorneys' Fees and Costs

Jagodzinski also has moved to recover his legal fees and costs in response to this motion on the grounds that SVIC has made its motion for a stay in bad faith for the purpose of delaying production of the documents in question. Plaintiff's claim is not well-founded and does not support making an exception to the American rule, which generally requires parties to pay their own attorneys' fees.¹⁶ Plaintiff has not shown that SVIC made its motion in bad faith. The arguments raised in SVIC's briefs arguably are grounded in Delaware case precedent regarding statutory interpretation and, even if misguided, these arguments were presented promptly, professionally, and in accordance with the applicable rules. Therefore, I deny Jagodzinski's claim for attorneys' fees. Whether Plaintiff is entitled to his costs probably will depend on who the prevailing party is on appeal.

III. Conclusion

For the foregoing reasons, and based on my consideration of all the relevant factors, I deny Defendant SVIC's motion for a stay pending appeal, except to the limited extent that I hereby stay SVIC's obligations to produce the documents specified in the August 9, 2011 Order for ten days from the entry of this Letter Opinion and Order (*i.e.*, until August 30, 2011) to facilitate the orderly presentation of any motion SVIC may

¹⁶ See *Johnston v. Arbitrium (Cayman Is.) Handels AG*, 720 A.2d 542, 545-46 (Del. 1998).

Jagodzinski v. Silicon Valley Innovation Co., LLC
Civil Action No. 6203-VCP
August 16, 2011
Page 10

make to the Supreme Court for a stay pending appeal. I also deny Plaintiff's request for an award of the attorneys' fees it incurred in responding to SVIC's motion.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp